Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1435

LOCAL 336, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner,

vs.

GTE-AUTOMATIC ELECTRIC COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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vs.

GTE-AUTOMATIC ELECTRIC COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioner, Local 336, International Brotherhood of Electrical Workers, AFL-CIO, respectfully requests that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 21, 1978 and the subsequent order denying the Petitioner's request for rehearing, entered on December 19, 1978. The orders of the Court of Appeals for the Seventh Circuit affirmed the order of the United States District Court for the Northern District of Illinois, entered on January 31, 1978.

OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit was unpublished, pursuant to Circuit Rule 35. The decision of

the District Court is unreported. True and accurate copies of both decisions appear in the Appendix hereto.

JURISDICTION.

The jurisdiction of the Supreme Court of the United States is invoked under Title 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. Whether the question of mootness of a grievance under the collective bargaining agreement is to be determined by a Court or an Arbitrator; and

2. Whether the scope of the issues raised by a grievance under a collective bargaining agreement is to be determined by a Court or an Arbitrator.

UNITED STATES STATUTES INVOLVED.

United States Code of Arbitration, Title 9 U. S. C., Section 4.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being

satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Labor-Management Relations Act, Section 301, Title 29 U. S. C., Section 185(a):

§ 185. Suits by and against labor organizations
Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE.

The Original Petition to Enforce Arbitration.

On March 2, 1976 the Petitioner labor organization filed a petition in the United States District Court seeking an order to compel arbitration of a grievance processed by the Petitioner under the terms of a collective bargaining agreement with the Respondent Employer. Jurisdiction of the District Court was forwarded pursuant to the provisions of the United States Arbitration Act and Section 301 of the Labor-Management Relations Act.

The Grievance.

The underlying grievance was multi-faceted. The subject bargaining unit consists of skilled installers of central office telephone equipment for affiliated companies of General Telephone and Telegraph Company and independent companies in the telecommunications industry.

The grievance was filed in 1975 after the Petitioner learned that members of the bargaining unit were being solicited by the Respondent to accept two year temporary assignments to Iran in connection with a contract procurred by General Telephone to install telephone central office equipment in that country.

In its written grievance submitted prior to the actual assignments, the Petitioner contended that the Respondent had violated the bargaining agreement by:

1) Unilaterally establishing the terms of hours, wages and working conditions for the employees while on temporary assignment to Iran;

2) Not negotiating with the Petitioner over the effect of said temporary assignment upon the seniority and related rights of such employees during and after the completion of the temporary tour; and

3) The refusal of the Respondent to recognize the scope of the Petitioner's bargaining unit under their collective bargaining agreement as including assignment of installers outside the "forty-eight" mainland states.

The Respondent refused to agree that any or all of the issues raised by the Petitioner were "arbitrable". The Respondent also refused to submit the issue of "arbitrability" to an impartial arbitrator.

The Intervening Decision of the National Labor Relations Board.

After the Petitioner initiated suit in the District Court, the Respondent filed a unit clarification petition ("UC" petition) with the National Labor Relations Board, seeking a determination by the Board that the Petitioner's jurisdiction, under its collective bargaining agreement with the Respondent, did not extend beyond the forty-eight mainland states.

While the "UC" Petition was pending, the Respondent successfully obtained stay orders from the District Court pending a final ruling by the Board. During this interim period, the temporary assignments were effectuated, including several employees who were returned to the States from Iran on both a voluntary and involuntary basis. On November 30, 1976, the Board rendered its decision in the "UC" case, *GTE Automatic Electric Incorporated* and *Local No. 336, International Brotherhood of Electrical Workers, AFL-CIO*, 226 NLRB No. 197 (1976). The Board determined that the Petitioner's jurisdiction for representation could not extend to the employees while they were in Iran. In a footnote, NLRB member Jenkins noted, however, that the decision should not extend to the employees' representation rights with respect to negotiations over the employees' hours, wages and working conditions while in Iran and the retention of their seniority rights, including reemployment rights

upon their return to the United States. (Fn. 2, 226 NLRB 1223).

While the Board proceeding was pending and the action in the District Court was stayed, employees were temporarily assigned to Iran and in some cases involuntarily returned to the United States before their two year tour in Iran was completed.

The Respondent refused to reinstate the employees involuntarily returned to the United States to active employment in the bargaining unit, although the Petitioner sought their reinstatement, or, in the alternative, demanded arbitration of the issue. In numerous status calls and pleadings submitted by the parties to the District Court following the Board decision, the Court was fully and repeatedly advised that because of the passage of time, the Board decision and subsequent negotiations, the only remaining issues dividing the parties were:

1) The right of employees involuntarily returned from temporary overseas assignments outside of the Petitioner's jurisdiction as the bargaining representative to reassignment within the bargaining unit, or, at least, the right to have that question resolved through impartial arbitration under the parties' collective bargaining agreement; and

2) The right to submit the above question to impartial arbitration for one such employee who had been involuntarily returned from temporary assignment to Iran.

The District Court Decision.

The District Court rendered a final decision on January 31, 1978, dismissing the Petitioner's suit for "mootness", holding that the decision of the Board in the "UC" petition and subsequent collective bargaining between the parties had resolved all outstanding issues.

The Decision of the Court of Appeals.

The Court of Appeals affirmed the District Court's decision that the issues had been rendered moot. Additionally, the Court

of Appeals held that ". . . the rights of employees who prematurely leave their foreign assignment . . ." had not been the subject of the lawsuit and the Union had not availed itself of the grievance procedure of the bargaining agreement, citing *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965); and *Vaca* v. *Sipes*, 386 U. S. 171 (1967).

REASONS FOR GRANTING THE WRIT.

The Proper Determination of "Mootness" of a Grievance Is Fundamentally a Matter of Contract Interpretation and Application Which Should Be Referred to Arbitration.

The Court of Appeals did not hold that there was not a live contract issue between the parties concerning the rights, if any, of an employee involuntarily returned from an overseas assignment to be restored to active employment within the bargaining unit. Rather, the Court of Appeals concluded that this issue was not encompassed within the Petitioner's grievance which had been stayed for almost two years before the District Court held that all outstanding issues were moot.

Furthermore, there is nothing in the record before the Court of Appeals by which one could conclude that the Respondent and the District Court were not fully advised by the Petitioner of the remaining contract issue and the Respondent's refusal to arbitrate.

Thus, the Court of Appeals has significantly extended the scope of the Court's function in determining that jurisdiction should not lie with an arbitrator, at least in the first instance. In effect, the Court of Appeals has assumed responsibility, without any record of evidence, of interpreting and applying substantive provisions of the bargaining agreement by determining that:

1) The grievance originally filed by the Petitioner and ensuing written and oral communications between the parties over the next two years did not fairly comply with the contract's

procedure so as to allow a hearing on the merits over the remaining issue and its application to a single employee. In this regard, it should be noted that the District Court did not consider the question or develop a record that the Petitioner had not complied with the grievance procedure; and,

2) Determining that the grievance raised by the Petitioner back in 1975 at the inception of the Respondent's action, in arranging and setting the terms of the temporary assignments to Iran, did not encompass the effects of such actions upon members of the bargaining unit.

The issues of "mootness" and the scope of the grievances raised and processed by the Petitioner are interrelated. The key consideration is that the Court of Appeals has assumed the responsibility of interpreting and applying the perimeters of a grievance without a hearing, by declaring the Petitioner's action moot after the Petitioner was subject to stay orders for a two-year period. We are not aware of any decision of the Supreme Court of Appeals which confers upon the judiciary, rather than an arbitrator, the basic determination of the scope of a grievance when the issue raised by a party is clearly and legitimately a matter for contract interpretation and application. *United Steelworkers of America* v. *American Manufacturing*, 363 U. S. 564, 46 LRRM 2414 (1960); *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593, 46 LRRM 2432 (1969); *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U. S. 574, 46 LRRM 2416 (1961); *Operating Engineers* v. *Flair Builders, Inc.*, 406 U. S. 487 (1972); *Tobacco Workers* v. *P. Lorrilard Corp.*, 448 F. 2d 949 (C. A. 4, 1971); *Mine Workers* v. *Dow Corning Corp.*, 459 F. 2d 221 (C. A. 6, 1972); *Technical Engineers* v. *Western Electric Co.*, 508 F. 2d 106 (C. A. 7, 1974); *Machinists* v. *Howmet*, 466 F. 2d 1249 (C. A. 9, 1972).

CONCLUSION.

The effective right of an employee to a hearing to regain his employment will be denied if the Supreme Court does not grant this Petition.

Beyond the impact upon the individual is the overriding policy question which merits review by the Supreme Court. The decision of the Court of Appeals invites litigation as a substitute for arbitration, the preferred forum expressed by Congress in the National Labor Relations Act. The effect of the Court of Appeals' decision is to require the parties to engage in protracted and expensive litigation in advance of arbitration in which procedural and substantive issues may be aired in a single, expeditious proceeding.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued November 9, 1978

November 21, 1978

Unpublished Order not to be cited per Circuit Rule 35

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*

HON. ROBERT A. SPRECHER, *Circuit Judge*

HON. HARLINGTON WOOD, JR., *Circuit Judge*

LOCAL 336, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner-Appellant,

No. 78-1372 *vs.*

GTE-AUTOMATIC ELECTRIC COMPANY,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76 C 781

George N. Leighton, *Judge.*

ORDER

This is an appeal from the dismissal of a cause of action seeking to order arbitration, commenced under Section 301 of the Labor-Management Relations Act, 29 U. S. C. § 185 and the Arbitration Act, 9 U. S. C. § 4.

I

The respondent, GTE-Automatic Electric Incorporated (Company) and GTE International Incorporated (International) are independent wholly owned subsidiaries of General Telephone & Electronics Corporation. In April, 1975, International contracted with a company owned by the government of Iran to sell and install telephone equipment. A subsidiary of International, GTE Iran Incorporated, was responsible for the installation within Iran and employed all the installers working in Iran.

Approximately one-third of the total number of employees involved in the Iran project were from the Company. None of these employees were assured reemployment by the Company upon their return to the United States.

The Company and Local 336 of the International Brotherhood of Electrical Workers, A. F. L.-C. I. O. (Union) were parties to a collective bargaining agreement (Contract) effective August 1, 1973 through August 1, 1976, which recognized the Union as the exclusive bargaining representative subject to the National Labor Relations Act for all of the Company's employees employed as telephone equipment installers, but excluding office and clerical employees, guards and professional and supervisory employees, confidential employers, managerial employees, and all other employees not specifically included.

Approximately 850 installers employed by the Company in the United States were covered by the Contract. About 59 installers were employed by GTE Iran Incorporated in Iran.

On November 10, 1975, the Union proposed that an arbitration panel be convened pursuant to the Contract relative to the Union's right to negotiate wages, hours and working conditions of certain employees stationed in Iran. The Union also took the position that the Company had an obligation to negotiate with the Union relative to the effects on the remainder of the bargaining unit should these employees in Iran return to the United States and resume work covered by the Contract.

The Company took the position that employees stationed in Iran were not covered by the Contract and that therefore there was no contractual dispute to be arbitrated. The Union responded on January 14, 1976, by broadening its position to include "all foreign assignments, not just Iran" and reiterated the issues it contended were arbitrable as follows:

> [T]he Company's obligation to bargain over wages, hours and working conditions of members assigned to work in foreign countries . . . [and] the Company has an obligation to bargain with respect to the effect these members would have on other members of the bargaining unit when they returned to the States.

An impasse having been reached, on March 2, 1976, the Union filed this action in the district court, incorporating and attaching its letters of November 10, 1975 and January 14, 1976, both of which clearly specified the two questions at issue: (1) the wages, hours and working conditions of members assigned to foreign countries and (2) their effect on the remainder of the bargaining unit when they returned to the United States.

II.

Following the filing of the complaint, the Company filed with the National Labor Relations Board a petition seeking clarification of the bargaining unit. A hearing was held and on November 30, 1976, the Board entered its decision and order that the bargaining unit was "clarified by excluding from the unit telephone equipment installers employed on projects in foreign countries outside the United States." 226 NLRB 1222. One of the three Board members while agreeing that the Union could not bargain for its members in foreign countries, dissented, 226 NLRB 1223, n. 2.[1]

1. Note 2 reads: "Member Jenkins agrees that the union cannot bargain for its members with respect to their wages, hours, and working conditions in foreign countries. He would deny the petition

(Footnote continued on next page.)

After the parties learned of the Board decision, they engaged in further collective bargaining, which resulted in the following agreement:

> An employee who is transferred to an installer position in geographic locations outside the bargaining unit will maintain the seniority accumulated at the time of transfer but will not accumulate seniority for any time spent in this position. An installer being reassigned to the bargaining unit will be placed on the recall list of the Area from which transferred and will be recalled in accordance with his maintained seniority within the same time limitations set forth for recall rights. An installer recalled in accordance with the foregoing may be given wage progression credit.

Thereupon the Company moved to dismiss for mootness, based on the NLRB decision and the above negotiated agreement. On January 31, 1978, the district court dismissed the suit on the ground that all issues raised by the Union for arbitration are now moot. The Union has appealed.

III.

We affirm the court's judgment. The NLRB determined the first issue, bargaining rights of foreign employees, and the parties negotiated the second, namely the effect that foreign assignments

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(Footnote continued from preceding page.)
seeking clarification of the bargaining unit, however, because employees in the unit who are on temporary assignment to work in foreign countries retain many interests in the conditions of employment in the unit in the United States. There was testimony indicating they are in layoff status while on temporary foreign assignment and, in this respect, they clearly remain members of the bargaining unit. They are entitled to bargaining representation with respect to such matters as the terms of their transfer to foreign countries, their retention of seniority rights, their rights to be returned to the United States, and their reemployment rights. The fact that the Employer need not bargain about the terms and conditions of their employment in Iran hardly relieves it of the duty to bargain about such other matters as those mentioned. For these reasons, Member Jenkins would not exclude from the unit employees on temporary assignment in foreign countries and would dismiss the petition."

have on the remainder, or other members, of the bargaining unit. The Union on appeal has sought to add a new issue: the rights of employees who prematurely leave their foreign assignment or are discharged from foreign employment. The pleadings were never amended nor sought to be amended to encompass this new issue. Board Member Jenkins' dissent in the Board case did not change the issues before the district court. Equally importantly, the Union has not availed itself of the grievance procedure under the collective bargaining agreement, which is prerequisite to arbitration, or a petition to order arbitration. *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965); *Vaca* v. *Sipes*, 386 U. S. 171 (1967).

Judgment affirmed.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Local 336, International Brotherhood of Electrical Workers, AFL-CIO, *Petitioner,* *vs.* GTE-Automatic Electric Company, *Respondent.*	76 C 781 Before the Honorable George N. Leighton, United States District Judge.

ORDER

This cause is before the court on the motion of respondent GTE-Automatic Electric Company to dismiss this action for mootness. The motion is granted. It appears from the record that all issues raised by the Petition for Arbitration have been mooted by the decision of the National Labor Relations Board in *GTE-Automatic Electric Incorporated and Local # 336, International Brotherhood of Electrical Workers, AFL-CIO,* Case No. 13-UC-87 (November 30, 1976), and by subsequent collective bargaining between the parties. Accordingly, this suit is dismissed.

So ordered,

/s/ George N. Leighton
George N. Leighton, United States District Judge

January 31, 1978